

DJW/mat

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS**

UNITED PHOSPHORUS LTD.,

Plaintiff,

v.

No. 03-2024-JWL-DJW

DONALD F. FOX, et al.,

Defendants.

MEMORANDUM AND ORDER

On November 14, 2003, Plaintiff United Phosphorus Ltd. (“Plaintiff”) filed its Motion to Compel Production of Documents (doc. 31) and For a Summary Order Pursuant to Kan. Stat. Ann. 17-651. On December 8, 2003, the Court ordered United (1) to file an amended motion to compel narrowing the scope of its original pleading to only those document requests that still remain in dispute; and (2) to brief the issue of whether this Court has jurisdiction to grant summary judgment on Count III of Plaintiff’s Complaint, which seeks a summary order conferring upon Plaintiff the right to inspect books and records pursuant to K.S.A. 17-6510(b). Although both the Amended Motion to Compel (doc. 37) and the Amended Motion for Summary Judgment are fully briefed, the Court’s ruling below addresses only with that portion of the briefing that relates to the pending Motion to Compel.

DISCUSSION

Request 1: EPA Documents

Plaintiff’s first request for production of documents requests “[a]ll documents related to the interaction of defendants with the United States Environmental Protection Agency” from December 1, 1997 to present. In response to this request, Defendants provided a copy of Midland’s

final consent judgment with the EPA, which was entered on November 11, 2002. Plaintiff asserts that this judgment references correspondence between Midland and the EPA, and more specifically references financial documents that were provided by Defendants to the EPA to substantiate Midland's claim that it was unable to pay the full regulatory penalty assessed. Plaintiff argues the correspondence and financial documents come within the scope of its original request and seeks to compel Defendants to produce them.

In response to Plaintiff's Motion to Compel, Defendants state they

have provided the plaintiff with every last document maintained in the file concerning the EPA investigation, which concluded with a final consent judgment entered on November 11, 2002. There may have been financial documents provided by defendants to the EPA which were referenced in correspondence between Midland and the EPA. However, Midland does not have copies of those financial documents, except those produced herewith. Again, Midland provided the entire file without exception. The plaintiff is currently in possession of all documents that the defendants possessed.

Notwithstanding these assurances by counsel, Plaintiff's counsel refused to withdraw its Motion, stating first that Defendants have never served the requisite pleadings, signed by counsel, formally responding to Defendants' document requests and second, that if Defendants truly do not have possession of the requested documents, such circumstances raise "very troubling questions" over Defendants' "stewardship of the corporations whose management is at issue in this case."

As a preliminary matter, the Court agrees with Plaintiff that Defendants should serve formal responses to the document requests propounded by Plaintiff as required by federal rule. If Defendants have not already done so, they shall serve the requisite responsive pleadings within ten (10) days from the date of this Order.

With regard to Plaintiff's contentions regarding the substance of Defendants' response to Request 1, the Court notes that Plaintiff offers no evidence to establish that Defendants have possession, custody or control over documents responsive to its request that have not been produced. The Court is unable to compel a party to respond to document requests when such party contends the documents already have been produced and the Court has no evidence to the contrary.¹ Accordingly, Plaintiff's motion with respect to Request 1 will be denied.

Request 2: Kansas Regulatory Documents

Request 2 seeks all documents related to interaction between Defendants and any Kansas State regulatory agency from December 1, 1997 to present. In its Supplemental Motion, Plaintiff asserts that nothing related to any Kansas regulatory agency has been produced, with the exception of the corporate Defendants' Kansas tax returns. In response, Defendants state "[t]here are no documents that satisfy this request except one state registration document that is being produced herewith."

Again, Plaintiff offers no evidence to establish that Defendants have documents responsive to its request that have not been produced. Simply put, the Court cannot compel Defendants to produce documents they say they do not have.² With that said, Defendants should serve a formal response to the document request confirming that there are no documents that satisfy this request except one state registration document that already has been produced. This responsive pleading shall be served within ten (10) days from the date of this Order.

¹See *Oleson v. Kmart Corp.*, 175 F.R.D. 560, 566 (D. Kan. 1997).

²*Id.*

Request 3: Documents from Jackson Ice Cream v. Midland Fumigant, Inc.

With regard to Request 3, Plaintiff concedes Defendants have produced virtually all documents removed from the Jackson Ice Cream lawsuit file maintained in the office of defense counsel Dan K. Wiley, with the exception of a certain settlement agreement. Plaintiff notes that Defendants have agreed to produce the settlement agreement pursuant to a stipulated order compelling production. In its Supplemental Motion, however, Plaintiff requests certification from Defendants that they have produced all related documents and will produce the settlement agreement and related correspondence pursuant to a stipulated order.

To that end, Defendants confirm in their responsive briefing that they have provided all documents and will enter into the referenced stipulated order. Accordingly, Plaintiff's Motion to Compel with regard to Request 3 will be denied as moot. Defendants will be ordered, however, to serve a formal response to the document request confirming that they have produced all responsive documents within their custody and control. This responsive pleading shall be served within ten (10) days from the date of this Order.

Request 4: Financial Records From 1997 Through Present

Request 4 seeks all financial records created by or for Defendant corporations from December 1, 1997 through present. Although Defendants produced their 2002 corporate tax returns, Plaintiff asserts Defendants have failed to produce the requested financial documents from years prior to 2002.

Defendants argue they satisfactorily have responded to the request because, on September 8, 2003, Plaintiff agreed to limit the temporal scope of its request to the period from January 1, 2002

to present. In support of this argument, Defendants submit written correspondence dated September 9, 2003, which appears to memorialize this agreement:

With regard to [Plaintiff's] requests that ask for documents as far back as December 1, 1997, [Plaintiff has] agreed to limit [its] requests temporally to January 1, 2002, with the exception that, in [its] Request No. 1 regarding the EPA documents, [Plaintiff is] requesting all documentation regarding the EPA complaint that was unresolved at the time that [Plaintiff] became a shareholder in the defendant corporations.

If [Defendants'] understanding of [the] conversation is incorrect in any way, please call [Defendants' counsel] immediately.³

Plaintiff disagrees with Defendants' characterization of the September 9, 2003 agreement, maintaining the "agreement" was a temporary accommodation conditioned upon the immediate production of certain other documents and Plaintiff never waived the right to pursue the requested discovery later. Plaintiff, however, offers no evidence to establish that the temporal limit was conditional and/or only a temporary accommodation. Accordingly, Plaintiff's Motion to Compel with regard to Request 4 will be denied as moot. Defendants will be ordered, however, to serve a formal response to the document request confirming that they have produced all responsive documents from January 1, 2002 to present that are within their custody and control. This responsive pleading shall be served within ten (10) days from the date of this Order.

Request 5: 2003 Financial Records

Plaintiff asserts Defendants have provided various financial records through September 2003 but request Defendants produce documents reflecting any unusual corporate expenditures during the past three years, as well as any efforts to buy or to sell all or part of the assets or stock of Midland and Kaw Valley in the last three years. Plaintiff also request Defendants supplement the response

³See Exhibit 1 to Defendants' Response to Plaintiff's Motion to Compel (doc. 33).

with complete third quarter financial information for both Kaw Valley and Midland as soon as practicable.

In response, Defendants state they are in the process of supplementing the financial records that have been produced through September 2003 with the financial records for the last quarter of 2003. Defendants additionally respond that they are unaware of any unusual corporate expenditures from January 1, 2002 that would not be in the ordinary course of the Defendants' business. Accordingly, Plaintiff's Motion to Compel with regard to Request 5 will be denied. Defendants will be ordered, however, to serve a formal response to the document request confirming that they have produced, and supplemented that production through third quarter, all responsive documents within their custody and control. This responsive pleading shall be served within ten (10) days from the date of this Order.

Request 8: Payments to Individual Defendants

Request 8 seeks “[a]ll documents related to payments to the individual defendants from defendants corporations from December 1, 1997 to the present.” Plaintiff asserts the corporate financial records produced so far only include categories of corporate expenditures such as salaries, commissions and “other” expenses and that there is no clear indication which of the numerous payments grouped under each category are directed to which individual defendant, or the amount of such payments.

Defendants respond by arguing that they have produced all documents responsive to the request and are not required to supplement a production of documents with a written explanation interpreting the numbers. The Court agrees. Accordingly, Plaintiff's Motion will be denied with respect to Request 8.

Request 9: Documents Subject to Disclosure Under Kan. Stat. Ann. 17-6510

Plaintiff moves to compel production of all document subject to disclosure under Kan. Stat. Ann. 17-6510, the same relief requested in Plaintiff’s Motion for Summary Judgment with respect to Count III of Plaintiff’s Complaint. Because the decision on this issue is dispositive in nature, the Court finds it is better decided in the context of a motion for summary judgment, as opposed to a motion to compel discovery. Accordingly, Plaintiff’s Motion to Compel with respect to Request 9 will be denied.

Request 10: Corporate Accounting Records

In Request 10, Plaintiff seeks all documents relating to accounting work performed for the corporate defendants from December 1, 1997 to present. Although Defendants produced documents from 2002 that are responsive to this request, Plaintiff asserts Defendants have failed to produce accounting records from December 1, 1997 through the present.

Defendants argue they satisfactorily have responded to the request in light of the September 8, 2003 letter limiting the temporal scope of its request to the period from January 1, 2002 to present.⁴ As noted above, Plaintiff disagrees with Defendants’ characterization of the September 9, 2003 agreement, maintaining the “agreement” was a temporary accommodation conditioned upon the immediate production of certain other documents and Plaintiff never waived the right to pursue the requested discovery later. Again, however, Plaintiff offers no evidence to establish that the temporal limit was conditional and/or only a temporary accommodation. Accordingly, Plaintiff’s Motion to Compel with regard to Request 10 will be denied. Defendants will be ordered, however, to serve a formal response to the document request confirming that they have produced all responsive

⁴See Exhibit 1 to Defendants’ Response to Plaintiff’s Motion to Compel (doc. 33).

documents from January 1, 2002 to present that are within their custody and control. This responsive pleading shall be served within ten (10) days from the date of this Order.

Request 11: Individual Accounting Records

Plaintiff requests the Court compel Defendants to produce all financial records and tax documents evidencing or accounting for transactions or payments between the individual and corporate defendants from December 1997 through the present. Defendants argue they satisfactorily have responded to the request because, on September 8, 2003, Plaintiff agreed to abandon Document Request No. 11 as that request related to the individual defendants, with the exception that, at some point in time in the future, Plaintiff would require Defendants to respond to Request 8: documents reflecting payments to the individual defendants from the corporate defendants.⁵ Defendants further argue they satisfactorily have responded to the request because, on September 8, 2003, Plaintiff agreed to limit the temporal scope of its request to the period from January 1, 2002 to present. Notably, Defendants have submitted written correspondence which appears to memorialize both of these agreements and Plaintiff offers no evidence to establish otherwise. Accordingly, Plaintiff's Motion to Compel with respect to Request 11 will be denied.

Request 12: Asset Records

Request 12 seeks all documents relating to assets of defendant corporations, including real property, bank and investment accounts, equipment, inventory, vehicles and accounts receivable. Plaintiff asserts the accounting records produced by Defendants provide some information on the assets Defendants claim are owned by the defendant corporations, but none of the documents evidencing actual ownership – vehicle title and registration documents, deeds to real property, etc.

⁵*Id.*

– have been produced. Plaintiff also asserts Defendants have failed to produce documents related to loans from Defendant corporations to the individual Defendants.

In response, Defendants state they have provided the deed to the only piece of property that the corporations own and will produce vehicle titles to approximately 5 corporation vehicles. Defendants further state there are no documents related to loans from Defendant corporations to the individual Defendants and therefore, none can be produced.

As noted, *supra*, the Court is unable to compel a party to respond to document requests when such party contends the documents already have been produced and the Court has no evidence to the contrary.⁶ Accordingly, Plaintiff's motion with respect to Request 12 will be denied. With that said, Defendants should serve a formal response to the document request confirming that there are no documents that satisfy this request except the ones already produced. This responsive pleading shall be served within ten (10) days from the date of this Order.

Request 13: Liability Records

With respect to Request 13, Plaintiff contends it has not received adequate information regarding a \$1 million debt owed by Defendant corporations to Drexel Chemical Company. In response to this request, Defendants state

The defendants have provided to the plaintiff all documents in the defendants' possession regarding the debt to Drexel Chemical Company. The defendants do not have possession of the original documents. The original documents of several years ago were signed by the defendants and forwarded to Mr. Tom Cates, an attorney for Drexel Chemical Company in Memphis, Tennessee. The defendants have not received ever an original copy of said documents signed by all parties. The plaintiff is aware that Mr. Cates has possession of these documents. Mr. Cates originally agreed to produce said documents to the defendants for reproduction to the plaintiff in mid-December of 2003. Mr. Cates now refuses to produce those documents as of

⁶*See Oleson v. Kmart Corp.*, 175 F.R.D. 560, 566 (D. Kan. 1997).

this date to the defendants. Therefore, the defendants do not have original signed copies of the referenced documents, but have produced to the plaintiff a copy of all documents that the defendants have in their possession.

Again, the Court is unable to compel a party to respond to document requests when such party contends the documents already have been produced and the Court has no evidence to the contrary.⁷ Accordingly, Plaintiff's motion with respect to Request 13 will be denied, but Defendants shall serve a formal response to the document request confirming that there are no documents that satisfy this request except the ones already produced. This responsive pleading shall be served within ten (10) days from the date of this Order.

Sanctions

Plaintiff seeks to recover the fees and expenses it incurred in connection with this Motion to Compel. Fed. R. Civ. P. 37(a)(4)(C) provides that "the court may . . . apportion reasonable expenses incurred in relation to the motion among the parties and persons in a just manner." In this instance justice requires that each party be responsible for their own costs and expenses incurred.

Accordingly, for the reasons set forth above, it is hereby ordered that

- (1) Plaintiff's Motion to Compel and Request for Sanctions (doc. 31) and Plaintiff's Amended Motion to Compel and Request for Sanctions (doc. 37) are denied; and
- (2) Within 10 days from the date of this Order, Defendants shall serve formal responses to the document requests propounded by Plaintiff as required by federal rule.

IT IS SO ORDERED.

Dated in Kansas City, Kansas on this _____ day of October, 2004.

⁷*Oleson v. Kmart Corp.*, 175 F.R.D. at 566.

David J. Waxse
United States Magistrate Judge

cc: All counsel and *pro se* parties